

2007

Celso Magana and Yolanda Magana v. ABM Crane Rental, Dave Roth Constructions and John Does I-V : Brief of Appellants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CELSO MAGANA and YOLANDA
MAGANA,

Plaintiffs/Appellants,

v.

ABM CRANE RENTAL, DAVE ROTH
CONSTRUCTION, and JOHN DOES I-V,

Defendants.

DAVE ROTH CONSTRUCTION, Appellee.

Appellate Case No. 20070548

BRIEF OF APPELLANTS

Appeal from a Judgment of Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Kate Toomey

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JURISDICTION

This court has jurisdiction to decide this appeal, pursuant to U.C.A. § 78-2-2(3)(j)(2001), as an appeal from a grant of Summary Judgment by the Third Judicial District Court of Salt Lake County, State of Utah, entered on June 13, 2007. This appeal was “poured-over” to the Utah Court of Appeals pursuant to U.C.A. § 78-2a-3(2)(j)(2001).

ISSUES ON APPEAL

The following issues are presented on appeal:

1. Whether DRC actively participated in construction of the restaurant, including the provision of a crane and operator to off-load roof trusses?
2. Whether DRC voluntarily undertook a duty to exercise reasonable care in off-loading the roof trusses?
3. Whether DRC undertook an inherently dangerous activity in using a crane in off-loading the roof trusses through ABM Crane Rental?
4. Whether DRC drc undertook a duty to provide precautions required by federal regulations when it arranged to use ABM Crane Rental in off-loading the roof trusses?
5. Whether ABM Crane Rental was the agent of DRC when it undertook the task of off-loading roof trusses?

The standard of review for all issues is *de novo*, as the case was decided on summary judgment. See *Local Gov’t Trust v. Wheeler Machinery*, 2006 UT App 513, 154 P.3d 175 (summary judgment question of “retained control” reviewed de novo).

STATEMENT OF THE CASE

1. Nature of the Case

This case arises out of a construction site accident, on April 29, 2005. Magana was a laborer for Circle T, a framing subcontractor at the site of a new Der Weinerschnitzel. A semi truck delivered a load of roof trusses, which were loaded on a flatbed trailer. A crane company was hired to lift the load of roof trusses, and place them as needed for erection of the building. A load of roof trusses became unbalanced, slid and fell on Magana, who is now a paraplegic.

2. Course of Proceedings and Disposition in the Court Below

Magana brought suit against the general contractor, Dave Roth Construction (DRC), and the crane company (ABM Crane). He settled with ABM Crane, and DRC later moved for summary judgment, which was granted, resolving the final claims against the remaining party, DRC. Magana appealed..

3. Statement of Relevant Facts on Appeal

Cast of Main Characters:

Celso Magana, who was an ordinary laborer for Circle T, a framing subcontractor. Because his deposition testimony is such a matter of controversy, the relevant portions are attached as an addendum hereto.

Circle T Construction, Magana's employer, which was a framing subcontractor on a job to build a Der Weinerschitzel store.

Ted Alexander, the Circle T foreman at the site.

Dave Roth Construction, the general contractor hired by the property owner to build the

store.

Brett Campbell, the construction superintendent at the site for Dave Roth Construction.

ABM Crane Rental, a crane company that furnishes cranes and crane operators to job sites.

Alex Valdez, the crane operator from ABM Crane Rental, who was at the controls when the load of roof trusses fell on Magana.

The Facts in the Record:

The facts are found most conveniently in the “Reply Memorandum in Support of Summary Judgment”, filed by DRC, from pages iv to xlv, found in the Record at 730-770. The original depositions were submitted by Magana, in their entirety, as an appendix from 467-692, where the citations may be cross-checked for accuracy and context as the Court may desire. For convenience, Magana uses the numbered facts found at R. 730-770 for discussion.

DRC was hired to act as the general contractor on a project involving the construction of a Weinerschnitzel restaurant. (Fact 11). Dave Roth is the owner of DRC. (Fact 12). Brett Campbell was DRC’s superintendent on the project. (Fact 13). On the date of the accident, Brett Campbell was a DRC employee on the work site at the time of the accident. (Fact 14). DRC was to provide a finished product building for the owner, to secure subcontracts from subcontractors for the owner, and to purchase building materials for the project. (Fact 15).

DRC solicited bids from several framing subcontractors, including Circle T, which was awarded the job. (Fact 16). Dave Roth learned about Circle T from a building supplier. (Fact 17). DRC had never worked with Circle T prior to asking the company to submit a bid for framing the

project. (Fact 18). During the bid process, Dave Roth spoke with Ted Alexander, the owner of Circle T regarding Circle T's qualifications. (Fact 19). Circle T submitted a bid proposal to DRC to provide "framing labor, including crane". (Fact 20). Circle T's bid for framing labor and crane work was \$13,500.00. (Fact 21). DRC accepted Circle T's bid for the framing labor and crane work. (Fact 22).

On the day before the accident, Brett Campbell was notified that the truss joists would arrive the next day and would need to be offloaded by a crane. (Fact 23). Brett Campbell notified Ted Alexander from Circle T that his truss joists for the roof would be arriving and advised him to have a crane available for offloading the joists. (Fact 24). Ted Alexander learned that the crane company Circle T normally used would not be available in the morning of April 29, 2004, and asked Brett if he could contact another crane company: (Fact 25). What DRC submitted as Fact 26 is somewhat unclear, but includes testimony by Ted Alexander (of Circle T) to the effect that he and Brett Campbell (of DRC) jointly "split" the task of getting a crane on site, and offloading the roof trusses. (Fact 26). Before the date of the accident, Circle T had used its own crane company to perform lifting work. (Fact 27).

It was undisputed that ABM Crane did not actually bill for its work, due to Magana's accident. ABM Crane's owner is Eric Johnson, who stated that if he had billed for ABM's work, he would have billed DRC, not Circle T. (Fact 28). He also stated that he did not know if DRC would turn around and bill Circle T for ABM's crane work. Id. However, Dave Roth testified that he would have asked Circle T to pay the ABM bill. (Fact 29). On the other hand, Ted Alexander of Circle T testified that he and Brett Campbell agreed to split the cost of the crane. (Facts 26, 30).

Entering the "Spin Zone":

At this point, the facts submitted to the trial court by DRC started containing “spin”, by way of characterization, commentary, conclusions and amplifications. For instance, the next “fact”, No. 31, states that Ted Alexander acknowledged that “unloading the trusses by crane from the flatbed was solely Circle T’s responsibility”. For starters, it is NOT undisputed that Circle T was solely responsible for unloading the trusses. Actually, it was undisputed that, at a minimum, it was a joint responsibility between Circle T and ABM Crane Rental, who was running the crane, under the general supervision and control of DRC. By federal regulations, it was ultimately ABM Crane, not Circle T, who was responsible for the decision to lift the load as rigged.¹

But, the question as put to Ted Alexander only went so far; it only asked about who he talked to about “*what* you wanted to unload”, and “*where* you wanted to unload” the trusses. Neither of those questions resolve the ultimate question of who was in charge of “safety” on the job, or who had the right to “control” the safe rigging of the load. And Ted Alexander’s statement is at odds with the other testimony that, in fact, Brett Campbell did help rig the load that fell on Celso Magana. Just because Ted Alexander recalled it differently does not make it an “undisputed” fact.

Because many of the following “facts” submitted by DRC contain editorialization, Magana only admitted the actual deposition testimony referenced, but not the “spin” appended to the quotations. With that caveat, the facts specifically numbered facts submitted follow.

Ted Alexander stated that, on other occasions, either Circle T or the lumber company, not DRC, handled the offloading of roof trusses. (Fact 32). On the date of the accident, Circle T’s

¹ The fact that ABM Crane Rental was responsible by federal regulation is why they quickly settled. If it was all Circle T’s problem, presumably ABM would have made that defense.

employees, including Magana, Brody Tolman and Ted Alexander, began work at 6:30 a.m. (Fact 33) The accident occurred at approximately 7:30 a.m., and before that time Circle T's employees were waiting for the crane to show up. (Fact 34). When the crane from ABM Crane arrived, that had been arranged by Brett Campbell, Ted Alexander told the operator what to unload and where to put it. (Fact 35)(compare DRC's characterization that Ted Alexander "directed him [crane operator] where to set up the crane"). Brett Campbell did not participate in the discussion about what to unload and where to put it. (Fact 36, 58).

Alex Valdez, the ABM Crane operator, averred that he set up the crane on his own, without direction from Brett Campbell.² (Fact 37). Likewise, he averred that Brett Campbell played no part in positioning the crane. (Fact 38). The crane was to unload two bundles of 38-foot high joists, 20 inches deep. (Fact 39). To lift the bundles of joists, they had to be "rigged" with straps. Ted Alexander testified that he did the rigging. (Fact 40). Alex Valdez averred the same. (Fact 41). Valdez also averred that no one from DRC controlled, directed or played any part in the rigging. (Fact 42). Valdez averred that only Ted Alexander rigged the load. (Fact 43). Valdez also averred that Ted Alexander adjusted the rigging twice, without assistance from DRC. (Fact 44). Valdez averred that he never saw anyone from DRC "direct, control, advise or in any way play a part in

² Alex Valdez avoided service of a subpoena from Magana's counsel to testify at a deposition, and his employer refused to reveal where and when he was at work to further frustrate service, but somehow Valdez appeared voluntarily at DRC's counsel's office to sign an affidavit prepared by DRC's counsel. Magana was not able to serve and depose Valdez.

Circle T's lifting, rigging and setting down either of the two loads". (Fact 45)³.

Brody Tolman, Magana's co-employee, remembered that Brett Campbell was in the area of the semi-truck from which the trusses were being off-loaded. (Fact 46). He did not remember anyone from DRC instructing Ted Alexander or Alex Valdez about rigging the load. (Fact 47). Tolman did admit that Brett Campbell did not give any instruction about where to stand or not to stand, or instructions about guiding loads over the fence. (Fact 48).

Brett Campbell testified that it was his duty on the job to "watch subcontractor's work" to ensure the correctness of the work, and the quality control of the project. (Fact 49). Because restaurant construction involves precise building requirements, Campbell "chalked" or "snapped" the lines for the construction of the walls by Circle T. (Fact 50). Campbell admitted that it was he who arranged for, and contracted for, the use of ABM Crane. (Fact 51, 52, 53, 54).

DRC solicited labor-only bids from subcontractors, but retained control of all other aspects of the project, including purchasing building materials, and arranging for shipping of them to the project site. (Fact 55, 56). The labor of offloading of materials was usually the subcontractor's responsibility. (Fact 57).

Magana testified that he did not "know" Brett Campbell. (Fact 59). Magana stated that no one other than Ted Alexander told him how to do his work. (Fact 60). He stated that, on prior occasions, Brody Tolman and Ted Alexander offloaded the materials. (Fact 61). Magana only saw Ted Alexander speak to the crane operator. (Fact 62)(compare DRC's characterization "only Ted

³Valdez blamed Magana for pulling the load out of the rigging and over onto himself. Given the size, weight and rigging of the load, this is impossible.

Alexander directed the crane operator”). Magana stated that no one helped him offload the trusses other than Brody Tolman, Ted Alexander, and the crane operator. (Fact 63). Magana testified that Ted Alexander rigged the first load, but that “I don’t know for the first time if the other guy was there for the first one”. Here, Magana is referring to Brett Campbell, DRC’s superintendent, as the “other guy”. Then, Magana is asked “who put the straps around the second load of the truss joists?”. His answer is “I didn’t see anyone”. This answer is inconsistent with other statements he made at the deposition, so Magana admitted that DRC had accurately cited to that specific portion of his testimony, but not that it was reflective of his testimony otherwise or generally. (Fact 64). The second load is the load that fell on Magana. (Fact 65).

DRC’s counsel then submitted “Fact 66”, which referred to the fact that a lunch break was taken. DRC’s counsel also inserted a gratuitous assertion that Magana “was allowed to confer with counsel and family members during this break”. There is no evidence in the record to support this assertion, beyond the fact that a lunch break was taken. Whether Magana conferred with anyone about his deposition over the lunch hour is unknown, but served to set up the claim of DRC’s counsel that Magana was coached to lie by his counsel over the lunch break. This outrageous suggestion was later retracted by DRC’s counsel. The only fair statement is that Magana’s testimony was clarified after the lunch break, during questioning by his own counsel, but that clarified testimony was consistent with his original testimony before the lunch break, with the exception of the exchange with DRC’s counsel, which created the confusion. So, Magana admitted that part of Fact 66 that acknowledged that a lunch break was taken, but nothing further.

DRC also submitted “Fact 67” about an afternoon break in the deposition, again with the

claim that Magana conferred with counsel and family members about his deposition testimony during the break. Again, this suggestion is spun out of thin air, and intended to suggest again that Magana's counsel or family coached him to lie. This outrageous suggestion is unprofessional, to say the least, and false as well. DRC's counsel later withdrew any suggestion that Magana's counsel had coached him, but then proceeded to submit "Fact 68", which asserted directly that Magana "changed his testimony" and stated that "a second individual helped Ted Alexander rig the second load of truss joists". This was untrue, as Magana had testified about the second individual helping Ted Alexander on the second load before the lunch break, and before the afternoon break. To suggest that Magana "changed his testimony" is again a mis-characterization of his testimony, and given the way DRC's counsel set up the claim, clearly accused someone of coaching Magana coaching him to lie.⁴

Magana was asked if he would "defer to" Ted Alexander's testimony that only he rigged the load. Fact 69. Magana at first did not understand what the question asked, but later said that he would. Brett Campbell averred that he does not recall helping rig the second load. Fact 70. However, this was submitted by way of a supplemental affidavit after his deposition was concluded. Magana's counsel had no opportunity to probe this new fact; perhaps Campbell would admit that, while he did not recall helping rig the second load, he could have. Ted Alexander also averred that did not recall Brett Campbell helping rig the second load. Fact 71. This supplemental affidavit also suffers from the problem of the Brett Campbell affidavit. Viewed in a light most favorable to Magana, neither assertion specifically contradicts Magana, as they merely state that they do not "recall" Campbell

⁴On the subject of ethics, DRC's counsel inserted an improper speaking objection to try to "coach" Magana not to testify about a second helper. See Fact 68.

helping rig the second load. They may have simply forgotten what Magana specifically recalled.

DRC submitted “Fact 72” which stated that according to Brett Campbell and Ted Alexander, the off-loading of the roof trusses “was under the direction, supervision and control” of Ted Alexander and Circle T. This “fact” is inconsistent with Magana’s testimony that Brett Campbell did help rig the second load of trusses, and the conclusion that a jury might draw from the other evidence, cited elsewhere, that Campbell did “actively participate” in the project, including the off-loading of roof trusses, and that the entire project was under his “direction, supervision and control”. “Fact 72” is rather, in the nature of a legal conclusion to be drawn from all the evidence by the fact-finder, and simply having a witness aver to it does not make it an “undisputed” fact if there are other facts, the totality of which might lead the fact-finder to a different conclusion.

“Fact 73” repeats the allegation that Magana “changed his testimony under oath after conferring with his counsel and family”. In DRC’s reply, it toned this outrageous accusation down, by claiming merely that DRC “does not seek to impugn the integrity or motives of opposing counsel”, a tactically wise move given the ongoing working relationship between Bertch Robson and Strong & Hanni. However, DRC continued to attempt “to show the court that Plaintiff’s testimony was substantially altered for unknown reasons after recesses where Plaintiff had the opportunity to confer with family and counsel”. (Fact 73). Whether this is really a difference or not is debatable. However, Magana’s testimony speaks for itself, and needs no dark accusations as to the motives of himself, his family or his counsel. Those accusations are not “facts” but “spin”, to make Magana look like a liar.

Facts 74 and 75 are essentially a repeat of Fact 72. The fact that Brett Campbell and Ted

Alexander believe that DRC did not meet the “retained control” or “active participation” tests are not “facts” which are disputed, but rather, conclusions that a fact-finder might or might not make after considering all the evidence. Magana admits the “positions” of Campbell and Alexander on liability but not that those “positions” are correct. These subjective opinions of the two witnesses are not reflected in any objective evidence, such as documents or even conversations between the two. The other facts about supervision and control may lead a jury to conclude that Ted Alexander is merely attempting to provide “cover” for the company that hired him.

Fact 76, stripped of the preamble about Magana’s “changed testimony”, is true; Magana could not recall which end of the load Campbell rigged and which end Alexander rigged.

Magana submitted additional facts:

Both Ted Alexander and Brett Campbell were on the flatbed trailer rigging the truss that fell on Magana. (Facts 77, 86). Brett Campbell and Ted Alexander were on the trailer unloading boxes of “blocking” when the second load fell on Magana. (Fact 80). Campbell looked to see if Magana or anyone else was “under the load”. (Fact 81). Campbell say Brody Tolman and Magana holding the tag lines on the second load, but that he did not believe anyone was under the load. (Fact 82). If Campbell had seen Magana under the load, he “would have alerted him of the fact that you don’t get under loads”. (Fact 83). Brett Campbell was involved in the actual management of the project. (Fact 84).

Magana’s testimony was translated into, and from, Spanish by Silvia Schulter. (Fact 85). Magana testified, IN THE FIRST INSTANCE, that Ted Alexander and “someone else” placed the rigging straps around the truss joists. (Fact 86). DRC denied this fact, by arguing the testimony of

other witnesses, and the SUBSEQUENT testimony of Magana that he didn't see anyone" rig the second load. Because DRC refused to acknowledge Magana's INITIAL testimony that Ted Alexander and "someone else" rigged the second load, and admit or deny it, DRC implicitly conceded that that was, in fact, an accurate statement of Magana's testimony. See DRC "Response" to Fact 86, which was referenced in response to Magana's Facts 87-91..

Magana saw Ted Alexander and "someone else" at each end of the truss, placing the straps around the end of the truss. (Fact 87). Magana could actually see this "someone else" placing straps around the end of the truss. (Fact 88). Magana testified that the second person, "someone else", who was on the trailer, helped place straps around the truss joists. (Fact 90). Magana clearly identified Brett Campbell as the second person when shown Campbell's picture. (Fact 91). DRC's response to Fact 91 did not dispute that the quotation of Magana's testimony was accurate, which it was, but accused Magana's counsel of coaching Magana by showing him the photo previously. This does not directly dispute the accuracy of the citation to Magana's testimony.

Fact 92, which references an affidavit signed by Magana, which explains that he did not mean to say there was only one person rigging, but if so, he misunderstood the question. R. 471-474.

Campbell got his job as construction superintendent at DRC because he observed the lack of involvement of the prior DRC superintendent. (Fact 93). Campbell expected the construction superintendent to actively watch the performance of the various subcontractors, to make sure that there was "quality control", as opposed to just inspecting the finished product or project. (Fact 94). DRC was responsible to get the lumber shipped to the job site. (Fact 95). DRC and Circle T jointly shared the responsibility of placing that lumber. (Fact 96; DRC's response refers to other testimony

which does not contradict the characterization of Magana that it was a joint decision). Campbell snapped the lines for the walls, for Circle T to frame. (Fact 97). Ted Alexander and Brett Campbell figured out where to place the walls. (Fact 98). Brett Campbell and Ted Alexander “both came to an agreement” how to unload the walls. (Fact 99).

Dave Roth himself ordered the truss joists. (Fact 100). The truck driver that delivered the truss joists arrived the night before and was ready to unload at 7:00 a.m. (Fact 101). The crane company that Ted Alexander called could not come until noon, so Campbell “took the responsibility to call ABM Crane Rental”. (Fact 102). On the morning of the accident, Campbell showed up 15 minutes early “to walk through and check things out”. (Fact 103). Campbell woke up the driver of the truck on which the trusses were shipped. (Fact 104). Campbell got Ted Alexander together to work out the exact place to unload the trusses. (Fact 105). Campbell watched Ted Alexander back the truck up, to the place where he wanted it. (Fact 106). There were no other workers there, at that time, other than the truck driver and Circle T workers, for Campbell to supervise. (Fact 107). The crane arrived, and set up where Ted Alexander told him to set it up. (Fact 108). Ted Alexander, Brett Campbell and the crane operator were basically “all standing in the vicinity of [the crane]”. (Fact 109). Ted Alexander talked with Brett Campbell the day before about where Ted wanted to place the crane. (Fact 110). Campbell briefly talked to the electrician, and in the area where the trusses were being unloaded. (Fact 111). Campbell initially attributed the falling of the load to using wet straps to hold wet trusses, allowing for slippage. (Fact 112). Campbell now attributes the cause of Magana’s injuries to his being under the load. (Fact 113).

SUMMARY OF ARGUMENTS

An employer who is “actively participating” in the work process of a contractor is liable for failing to exercise reasonable care. *Thompson v. Jess*, supra. There was abundant evidence in the record that Dave Roth Construction (DRC), through its construction supervisor, Brett Campbell, “actively participated” in the work of delivering truss joists to the Weinerschnitzel job site, by arranging the delivery, coordinating contact between Ted Alexander, the truck driver, and the crane operator; by helping to place the wet straps on the wet load that fell; and failing to exercise his prerogative to halt operations or warn workers who were under the load. Under each of the Restatement of Torts, 2d, sections cited below, the employer, here, DRC, retains liability for the negligence of the contractor, here, ABM Crane Rentals, for the negligent rigging and handling of the truss joist load that fell on Celso Magana. At a minimum, a reasonable jury could so conclude. Summary judgment should have been denied.

ARGUMENT

POINT ONE

A JURY COULD HOLD DRC LIABLE FOR ITS OWN, DIRECT, ACTIVE PARTICIPATION IN NEGLIGENTLY RIGGING THE SECOND LOAD OF ROOF TRUSSES FOR LIFTING

The Utah Supreme Court in *Thompson v. Jess*, 979 P.2d 322 (Utah 1999) adopted the Restatement of Torts, 2d, §414 “Negligence in Exercising Control Retained by Employer”. The *Thompson* court phrased the question as whether the principal employer “actively participated” in the project. *Id.*, at ¶18. “Under the ‘active participation’ standard, a principal employer is subject to liability for injuries arising out of its independent contractor’s work if the employer is actively

involved in, or asserts control over, the manner of performance of the contracted work.” Id., at ¶19. The Utah Supreme Court distinguished “active participation” from “passive non-participation” as the two sides of this coin. Id.

“Under the ‘active participation’ standard, a principal employer is subject to liability for injuries arising out of its independent contractor’s work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work.” Id., at ¶19. Again, Brett Campbell, who was jointly responsible for safety on the project, was present at the unloading site, rigging his end of the load, and assuming the responsibility of safety, including warning workers who might be caught under the load. This constitutes “active participation” under the standard set by the Utah Supreme Court. The *Thompson* court elaborated that active participation includes “either the direct management of the means and methods of the independent contractor’s activities or the provision of specific equipment that caused the injury”. Id., at ¶20. Again, DRC provided the “specific equipment that caused the injury”, i.e., the crane, and directly managed the rigging and unloading of the truss joists.

The *Thompson* court approved comment b to Section 414: “A typical instance in which such an exertion of control might occur is ‘when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job’.” Id., ¶21. With these principles in mind, the actions of Brett Campbell and DRC constituted “active participation” rather than “passive non-participation”.

Campbell Helped Rig The Second Load That Slipped And Fell On Magana.

Magana testified that both Campbell and Alexander both actually rigged the second load that

slipped, and fell on Celso. Facts 85-90. Campbell, of course, testified that he was with Ted Alexander on the trailer (loaded with trusses) unloading boxes of “blocking” when the second load fell on Magana. Fact 80. Brody Tolman, Magana’s co-employee, placed Brett Campbell in the area of the semi. While he was admittedly on or around the load of trusses, Campbell did not “recall” actually helping rigging, while Managa said he did.

Magana’s testimony was translated into, and from, Spanish by Silvia Schulter. Magana stated that Ted Alexander and “someone else” placed the straps around the truss joists. Ted and “someone else” were at each end of the truss, placing the straps around the end of the truss. Magana could actually see this “someone else” placing straps around the truss joists. Magana testified at one point that he did not see the “someone else” placing straps around the truss joists. Later, Magana testified that the second person, “someone else”, who was on the trailer, helped place straps around the truss joists:

Q: . . . Is it Celso’s testimony that there was a second individual that helped rig the second load?

A: Yes.

Celso clearly identified Brett Campbell as the second person when shown his picture:

Q: Do you believe if you were shown a picture of this individual [that helped Ted], you could identify him?

A: Yes.

Q: Okay. I’m sorry I have this only on a computer.

...

Q: Celso, do you recognize this individual?

A: Yes.

Q: Who is he?

A: He is the one who was helping Ted.

Q: He was helping Ted on the second load. That is the load that fell on you; is that correct?

A: Yes.

MR. ROBSON: For the record, this video is of Brett Campbell's videotaped deposition; is that correct, Pete?

MR. BARLOW: Yes.

Celso Magana depo., p. 87, l. 5-22, Fact 91, R. 765.

From Magana's testimony, a jury could conclude that DRC actually participated in the negligent act, which was the rigging of the load of trusses with wet straps, in an incorrect configuration.

This contradiction in testimony creates a disputed issue of material fact as to whether DRC's own supervisor, Brett Campbell, Fact 13, failed to safely rig the second load of truss joists, in light of the rain and wetness of the straps and the load. Campbell's active participation in rigging the second load satisfies alone the active participation test.

Campbell And DRC Actively Participated In The Construction Project.

Campbell testified in his deposition that both he and Ted Alexander were BOTH in charge of safety for the project:

Q: Safety was yours [Campbell's] and Ted's responsibility on the site?

A: Correct.

Fact 78. Campbell testified that, if he had realized that Celso was under the load, he would have told him to stay out from under the load. Facts 81-83. Campbell testified that he got his job because he saw the lack of involvement of DRC's prior superintendent. Campbell expected a superintendent to actively watch the subcontractors for safety and quality control. Fact 94. Campbell discussed with Circle T where to unload the walls. Fact 96. Campbell snapped the lines for the walls, for Circle T

to follow. Fact 97. Campbell jointly figured out with Circle T where to place the walls. Fact 98. He and Ted Alexander “both came to an agreement” how to unload the walls. Fact 99.

Because Circle T could not come up with a crane and operator, Campbell assumed that responsibility of locating one. Facts 23-26. ABM Crane Rental was hired by Campbell, and would have sent its bill to DRC. Fact 28. Ted Alexander believed the crane and operator to be a shared responsibility between Circle T and DRC. Fact 26. This is consistent with the overall relationship, which was that Circle T essentially worked as employees for DRC as the contract was for “framing labor only”, Facts 20-21, with all materials supplied by DRC, under the general supervision of DRC, through Brett Campbell. This arrangement actually resembles an employee leasing arrangement, where laborers are supplied to a business, to work under their supervision. Contrast this to the usual subcontractor who agrees to provide a finished product, and assumes all responsibility for materials and supplies as well as labor. This is all further evidence of “active participation” rather than “passive non-participation” by Brett Campbell and DRC.

This point is made clear by contrasting the facts here with *Thompson*. In *Thompson*, the landowner, the contracting party, was not on the location when the negligent conduct and accident occurred. Unlike DRC, she was not in the business of constructing buildings. She did not enter into a “labor-only” arrangement, reserving all other elements of control to herself. She did not actively participate in supervising how the work was done, and did not actually participate herself, as DRC and Brett Campbell did here. The contrast in facts between *Thompson* and this case could not be clearer.

Another recent case from the Utah Court of Appeals is remarkably similar, however. In *Local*

Gov't Trust v. Wheeler Machinery, 2006 UT App 513, 154 P.3d 175, a City hired a contractor, Wheeler, to supply two generators, including the entire exhaust system. *Id.*, ¶2, 154 P.3d at 176. Wheeler in turn contracted with Richard Carlson, proprietor of Independence Welding (“Carlson”) to install “various parts of the exhaust system”. *Id.*, ¶3. Allegedly, Carlson negligently installed the exhaust, causing a fire which damaged the City’s power plant. Wheeler was sued, but defended based upon *Thompson v. Jess*, arguing that it did not retain control of Carlson’s work. *Id.*, ¶9, 154 P.3d at 178. The Court of Appeals found that it did, and reversed summary judgment in favor of Wheeler. *Id.*, ¶10.

The *Wheeler* case is similar to this one. There was evidence that it was Wheeler who hired Carlson, and not the City. Here, it was undisputed that DRC hired ABM Crane Rental, not Circle T. In *Wheeler*, a single direction from Wheeler to Carlson to “make it fit”, despite a problem in installation, was sufficient to show direction on the part of Wheeler, to constitute “retained control”. *Id.*, ¶10. In comparison, Brett Campbell and DRC were micro-managing this “labor-only” contract as part of the overall construction of the restaurant. Further, the *Wheeler* court found that, if Wheeler had agreed to assume the responsibility of installing the exhaust system, it would still be liable for Carlson’s work. Like *Wheeler*, because DRC actually assumed the responsibility of providing the crane and operator, DRC should be held liable for the results of that operation. Under the authority of *Thompson v. Jess*, and *Wheeler*, the summary judgment should be reversed, for the fact-finder to determine whether DRC should be held liable.

POINT TWO

DRC UNDERTOOK A DUTY TO EXERCISE REASONABLE CARE IN OFF-LOADING THE ROOF TRUSSES

When DRC undertook the active participation or management of the construction, including rigging and unloading process, it assumed a duty to exercise reasonable care:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harms is suffered because of the other's reliance upon the undertaking.

Restatement of Torts, 2d, §323 "Negligent Performance of Undertaking to Render Services".

Additionally, the Restatement of Torts, 2d, §324A "Liability to Third Person for Negligent Performance of Undertaking" applies:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or third person upon the undertaking.

DRC undertook the responsibility of rendering services to Circle T, specifically, rigging the second load of roof trusses. DRC should have recognized that proper rigging was necessary for the protection of Circle T's employees. DRC's failure to safely rig the load caused harm to Magana. This is a classic case for application of these two Sections of the Restatement.

POINT THREE

DRC UNDERTOOK AN INHERENTLY DANGEROUS ACTIVITY IN USING A CRANE IN OFF-LOADING THE ROOF TRUSSES

Additionally, the activity of unloading truss joists that weigh 3,800 pounds up into the air, and then placing them on the ground, is an inherently dangerous activity, making the employer, DRC, liable for the negligence of ABM Crane Rental:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Restatement of Torts, 2d, §416 “Work Dangerous in Absence of Special Precautions”. Campbell admitted that he realized the risk of the load falling on workers, including Celso. This is akin to the risk cited in the Reporter’s notes to this section, of “painting carried on upon a scaffold above the highway”. The related Restatement of Torts, 2d, §413 relating to “Duty to Provide for Taking of Precautions Against Dangers Involved In Work Entrusted to Contractor”:

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

This section, commonly referred to as the “peculiar risk doctrine”, applies to such a risk as a large crane lifting a heavy load over a work site, like this one.

Further, the Restatement of Torts, 2d, §427 “Negligence as to Danger Inherent in the Work”,

provides an admittedly similar rule of liability of an employer of a contractor:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

This section also uses the illustration of the painter on a scaffolding dropping an object onto a person below the scaffolding as a "danger inherent in the work". This is akin to the dropping of the trusses on Celso, a risk inherent in the task of lifting, by crane, trusses weighing 3,800 pounds overhead. The trial court should have applied strict liability or derivative liability under any or all of these three Sections of the Restatement of Torts, 2d.

POINT FOUR

DRC UNDERTOOK A DUTY TO PROVIDE PRECAUTIONS REQUIRED BY FEDERAL REGULATIONS WHEN IT ARRANGED TO USE A CRANE IN OFF-LOADING THE ROOF TRUSSES

Finally, the act of lifting heavy loads by crane is subject to detailed regulations by OSHA. These are found at 29 C.F.R. §1910.179(n)(3)(vi): "The employer shall require that the operator avoid carrying loads over people." A similar provision is found at 29 C.F.R. §1810.180(h)(3)(vi) and (h)(4)(ii). Further, whenever a load "approaches near or over personnel, the warning signal shall be sounded". Id., at 1910.179(n)(3)(xi); see 1910.180(h)(4)(ii) ("No person should be permitted to stand or pass under a load on the hook"). Whichever provision is applied, there is a statutory regulation to prevent this exact scenario. Violation of this statutory regulation creates liability on both the operator and the employer:

One who by statute or by administrative regulation is under a duty to provide

specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Restatement of Torts, 2d, §424 “Precautions Required by Statute or Regulation”.

The trial court did not address the application of any of these Sections, apparently in the absence of any authoritative pronouncements from an appellate court on these subjects. The trial court should have at least made an initial determination whether these additional theories of liability might apply, so that proper appellate review could be made.

POINT FIVE

ABM CRANE RENTAL WAS THE AGENT OF DRC

The original arrangement was that Circle T would provide the crane rental and operator to unload the truss joists that DRC was to purchase and deliver. Because of the unavailability of the usual crane and operator, Circle T and DRC jointly assumed that task. And it is undisputed that, in fact, it was DRC that hired ABM Crane Rental, that dropped the load on Celso Magana, Fact 28. Because DRC “assumed the responsibility” of providing the crane company, and agreed to split the cost, ABM Crane was the agent of both DRC and Circle T. Thus, the negligence of ABM Crane in lifting an unsafe load is imputed to DRC.

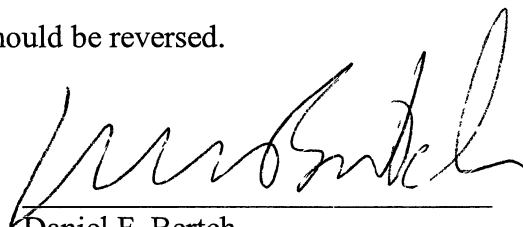
Further, the trial court need not have even focused on “control”, because the facts suggesting that Brett Campbell participated in the negligent act are sufficient on their own to establish “direct” negligence on DRC’s part, without resort to the “control” theory. A party is always liable for its own negligence, even if that negligence is coupled with the negligence of another. Here, the jury could find that both parties, DRC and Circle T, were negligent in the way that the second load was rigged

and lifted. If Brett Campbell and Ted Alexander were equally at fault for the negligent rigging, then DRC and Circle T would each bear 50% of the fault, and 50% of the liability, without resort to any doctrine of imputed or vicarious liability.

CONCLUSION

From all this evidence, there is a fair question for a jury whether DRC's activities were "actively participation" or "passive nonparticipation" under the "retained control" doctrine of vicarious liability. There were hotly disputed facts, and hotly disputed conclusions to be drawn from undisputed facts. Summary judgment was error.

There were additional theories of liability that did not depend on a finding of "retained control". The trial court erred by failing to address and rule on these theories. This Court should either remand for consideration of them, or formally adopt any or all and direct the trial court to apply them. The trial court's summary judgment should be reversed.

A handwritten signature in black ink, appearing to read 'Daniel F. Bertch', written over a horizontal line.

Daniel F. Bertch
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of Jan, 2008, a true and correct copy of the foregoing Appellant's Brief was mailed by U.S. Mail, first-class postage prepaid, as follows:

Peter Barlow

STRONG & HANNI

3 Triad Center, Suite 500

Salt Lake City, UT 84180

Attorneys for Defendant/Appellee Dave Roth Construction



ADDENDUM

- A. AFFIDAVIT OF CELSO MAGANA
- B. DEPOSITION OF CELSO MAGANA
- C. MEMORANDUM DECISION GRANTING SUMMARY JUDGMENT

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IN THE THIRD DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CELSO MAGANA and YOLANDA
MAGANA,

Plaintiff,

v.

ABM CRANE RENTAL, DAVE ROTH
CONSTRUCTION, and JOHN DOES I-V,

Defendants.

AFFIDAVIT OF CELSO MAGANA

Civil No. 050914998

Judge Timothy R. Hanson

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

COMES NOW Celso Magana, Plaintiff herein, having been first duly sworn and testifies as follows:

1. I make the following averments based upon personal knowledge.
2. There were two people who rigged the straps on the truss joists on the second load.

This was the one that fell on me.
3. The first person was Ted Alexander; the second person was someone I did not know,

but his photograph was shown to me at my deposition.

4. I am aware that, in my deposition transcript, at one point, I stated that Ted Alexander was the only person who rigged the straps on the second load of truss joists. I also stated in my deposition that there were two people who rigged the straps on the second load of truss joists. I never intended to state that there was only one person who placed straps on the second load of truss joists. If I did, it was because I did not understand the question as it was translated into Spanish for me. My deposition testimony that there were two people who placed the straps on the second load of truss joists is correct; the transcript where I stated that only Ted Alexander did it, is incorrect.

FURTHER, Affiant sayeth not.

Celso Magana
Celso Magana

SUBSCRIBED AND SWORN to before me this 26th day of October, 2006.



[Signature]

My Commission Expires:

Residing at:

February 22, 2009

Salt Lake

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CELSO MAGANA and YOLANDA
MAGANA,

Plaintiffs,

VS.

ABM CRANE RENTAL, DAVE
ROTH CONSTRUCTION and JOHN
DOES I-V,

Defendants

Case No. 050914998

Judge Timothy R Hanson

DEPOSITION OF: CELSO MAGANA



September 13, 2006
9:40 a.m. to 3:46 p.m.

Location: At the Law Offices of Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, Utah

Reporter Judy A. Holdeman, RPR, CSR
Notary Public in and for the State of Utah



Q A REPORTING, INC

CD ENCLOSED

of the accident?

A. **It was a skin boot -- boots made out of skin.**

Q. Like leather?

A. **Leather.**

Q. Steel toe?

A. **Yes. I always wore those steel-toed boots.**

Q. Did Circle T require you to wear steel-toed boots on the job?

A. **No.**

Q. Do you believe that the mud had played any role in causing your accident?

A. **I think so.**

Q. Why do you think that?

A. **Because I think that what was being used to tie the wood had moved.**

Q. And I think I -- sorry. I think I asked a different question.

Do you think because there was mud on the ground, did that play any part in causing the accident? I am not asking -- I will ask you about wetness on the wood, but I am not asking you that now.

A. **I don't think so, no.**

Q. Were you concerned at all that the ground was muddy?

A. **Yes.**

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Q. Why did that cause you concern?

A. **I was preoccupied or worried because there was a lot of mud. And there was some on my clothing as well.**

Q. Did you believe that there was a safety problem?

A. **No.**

Q. I am guessing from your answer that you didn't complain to anybody about the mud being a safety problem?

A. **No.**

Q. While the second load of truss joists were being lowered down to you, did you ever slip in the mud?

A. **No.**

Q. Are you okay? Do you want to take a break?

A. **I'm fine.**

Q. At the time that you were offloading the truss joists from the truck, was anybody else besides you and Brody and Ted and the crane operator on the project site?

A. **Yes, the other workers were there.**

Q. Do you know who those other workers were?

A. **No.**

Q. Did any of the other workers come help you offload the truss joists?

A. **No.**

Q. Where was Ted when the truss joists were being offloaded off the truck?

A. **He was up on the truck, on the material truck.**

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Q. Who placed the straps around the truss joists?

A. **Ted and someone else, but I don't know who it was.**

Q. Do you know whether it was the crane operator?

A. **No.**

Q. What did this other person look like?

A. **I don't remember.**

Q. Ted said in his deposition that he was the only one who put the straps on the truss joists. Do you agree with that?

A. **No, there was someone else.**

Q. What was this other person doing?

A. **Ted would put the straps on one end of the material and that other guy would put it on the other end.**

Q. Have you ever seen that other guy before?

A. **Yes, a couple times.**

Q. Do you know who this other person worked for?

A. **I think it was for the contractor of the restaurants.**

Q. And why do you think that?

A. **Because sometimes I would see them there.**

Q. Did you ever speak with that person?

A. **No.**

Q. Did you ever see that person speaking with somebody from the contractors -- from the general contractor?

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A. **Yes.**

Q. When did you see that?

A. **Whenever I was there.**

Q. So the person that was placing the straps, you saw that person speaking with someone from the general contractor?

A. **Yes.**

Q. And do you know the name of the person who he was speaking with?

A. **No.**

Q. What did this other person look like?

A. **I don't remember.**

Q. When the other person -- you said that Ted would put the straps on one end and someone else put the straps on the other end; is that correct?

A. **Yes.**

Q. Where were you standing?

A. **I was down.**

Q. And how far away from the truck were you?

A. **Around 20 feet or more.**

Q. Was there anything between you and the truck?

A. **No.**

Q. There wasn't a chain link fence?

A. **No, there was nothing. The truck was out on the road. And then there was a fence. But the truck was away**

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(Pages 48 to 51)

1 from the fence.

2 Q. But the fence was between you and the truck;
3 right?

4 A. Yes.

5 Q. Did you actually see this other person put the
6 straps around the truss joists?

7 A. Yes.

8 Q. Now, how many loads of truss joists were there?

9 A. I don't know. We had just lowered one, and the
10 second one was when I got injured.

11 Q. So who put the straps around the first load of
12 truss joists?

13 A. Ted.

14 Q. Only Ted?

15 A. I don't know for the first time if the other guy
16 was there for the first one.

17 Q. And then who put the straps around the second load
18 of the truss joists?

19 A. Ted.

20 Q. And did anyone else help Ted put the straps around
21 the second load?

22 A. I didn't see anyone.

23 Q. Now, it was the second load that slipped and fell
24 on you; correct?

25 A. Yes.

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1 Q. After Ted put the straps around the second load,
2 did the crane operator lift it up a little bit to check it?

3 A. No, I didn't see.

4 Q. Were you looking to see whether they would do a
5 test lift?

6 A. Yes.

7 Q. So -- but you didn't see them test it at all
8 before they lifted it up?

9 A. No.

10 Q. When the load was lifted up, was there anything
11 unusual about that load that you remember?

12 A. No.

13 Q. Did that second load swing or twist or anything
14 like that?

15 A. No.

16 Q. Now, we are talking -- you understand that we're
17 talking about the load that fell on you; correct?

18 A. Yes.

19 Q. So nothing out of the ordinary happened with the
20 second load?

21 A. No.

22 Q. Do you know what a tag line is?

23 A. Yes.

24 Q. Was there a tag line being used on the second
25 load?

Page 53

(Pages 52 to 55)

1 A. Yes.

2 Q. On whose side? Yours or Brody's?

3 A. On Brody's side.

4 Q. Were you using anything to keep the load from
5 swinging or turning or anything like that?

6 A. No. I was just -- like I am here, just away,
7 looking to hold it.

8 Q. Did you ever touch the load before it fell on you?

9 A. I was able to reach up and touch it a little.

10 Q. When you touched the load, what happened?

11 A. Nothing.

12 Q. Did you maintain contact with the load?

13 A. No.

14 Q. Why not? Was it lifted up higher?

15 A. Because they raised it up higher.

16 Q. Okay. Witnesses at the accident described or said
17 that you were straddling the first load -- or, in other
18 words, your legs were on either side of the first load. Did
19 that happen?

20 A. No.

21 Q. Where were you standing when the load fell on you?

22 A. Let's just say that's where the wood is going to
23 go. And I was standing here.

24 MR. BARLOW: Let's mark that as Exhibit-1.
25 (Exhibit-1 marked.)

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1 Q. (BY MR. BARLOW) Celso, let me show you what we
2 have marked as Exhibit-1. I've drawn a long rectangle that
3 will represent the first load and then a line to represent
4 the fence.

5 So draw on that Exhibit-1 where the semi with the
6 truss joists was.

7 A. That's where the truck was.

8 Q. So right above the exhibit sticker? Now, wait.

9 Draw where you were right when the second load
10 fell on you.

11 MR. ROBSON: Would you like him to place an X?

12 Q. (BY MR. BARLOW) Yeah, put an X there.

13 A. There.

14 Q. So you've drawn an X. So you weren't caught
15 between the first load and the second load or pinched
16 between the first load and the second load?

17 A. No.

18 Q. When the second load fell on you, did it knock you
19 to the ground?

20 A. Yes.

21 Q. Okay. Let me have that and the pen. How many
22 feet away from the first load were you when the second load
23 was dropped on you?

24 A. I don't remember.

25 Q. You didn't trip over the first load while you were

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16

1 training?
 2 A. They didn't want to pay for me to be able to go to
 3 the gym.
 4 Q. But did they pay for it?
 5 A. No. They don't want to.
 6 Q. After you go to school for -- to learn English,
 7 then what school would you want to go to after that?
 8 A. I want to go to the university to first learn
 9 English.
 10 Q. And then what? What do you want to do after that?
 11 A. I don't know, maybe to learn to get another job or
 12 something else.
 13 Q. Is there any type of job that you are interested
 14 in?
 15 A. Right now, I still don't know.
 16 Q. Have you spoken with anybody about the types of
 17 jobs you could do in a wheelchair with your paralysis?
 18 A. No.
 19 Q. Celso, have you ever been convicted of a felony?
 20 A. No.
 21 Q. Have you ever been involved in any other lawsuits
 22 like this one?
 23 A. Nothing.
 24 Q. Are you a citizen?
 25 A. I don't even know what a jail looks like.

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1 Q. Good. Do you have your citizenship to the US?
 2 A. I am a resident.
 3 Q. When did you get your residency?
 4 A. In '86, I received my residency.
 5 Q. Do you know of anyone who took photos of the
 6 accident scene?
 7 A. No.
 8 Q. Have you taken any photos of the construction or
 9 the alterations that have been made to your home?
 10 A. No.
 11 Q. Have you had to purchase any automobiles that are
 12 hand operated to allow you to drive?
 13 A. I just purchased one. And yesterday I took it in
 14 so they can fix it to where I can drive it.
 15 Q. What kind of automobile is it?
 16 A. Chevy Impala.
 17 Q. Do you know what the cost of that was?
 18 A. With taxes and everything, 14,000.
 19 Q. And how much will it cost to have them convert it
 20 into -- to allow you to operate it by hand?
 21 A. I don't know. Workers' comp is going to pay for
 22 that.
 23 Q. But you paid for the car?
 24 A. Yes.
 25 Q. Is there anything else that you've had to pay for

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(Pages 84 to 87)

1 because of your injury?
 2 A. No.
 3 MR. BARLOW: That's all I have got for you.
 4 MR. ROBSON: I have a couple questions, but I need
 5 to take a break first.
 6 (Recess from 2:42 p.m. to 2:48 p.m.)
 7 EXAMINATION
 8 BY MR. ROBSON:
 9 Q. Celso, I just have a couple questions for you with
 10 regard to your testimony today, is that okay?
 11 A. Yes.
 12 Q. If I understand your testimony related to who it
 13 was that rigged the trusses for lifting off the truck, I am
 14 talking about the second load of trusses that there was a
 15 second individual; is that correct?
 16 MR. BARLOW: Objection. Misstates his prior
 17 testimony.
 18 MR. ROBSON: Let me ask it this way: Is it
 19 Celso's testimony that there was a second individual that
 20 helped rig the second load of trusses?
 21 A. Yes.
 22 MR. ROBSON: Did he know this individual's name?
 23 A. No.
 24 Q. (BY MR. ROBSON) Had you seen the individual on
 25 the job before the day of your accident?

Page 86

1 A. Yes.
 2 Q. How many times do you believe you had seen him?
 3 In other words, was it every day?
 4 A. Almost every day.
 5 Q. Do you believe if you were shown a picture of this
 6 individual, you could identify him?
 7 A. Yes.
 8 Q. Okay. I'm sorry I have this only on a computer.
 9 MR. ROBSON: Pete, if you need to move so you can
 10 see it.
 11 Q. (BY MR. ROBSON) Celso, do you recognize this
 12 individual?
 13 A. Yes.
 14 Q. Who is he?
 15 A. He is the one that was helping Ted.
 16 Q. He was helping Ted on the second load. That is
 17 the load that fell on you; is that correct?
 18 A. Yes.
 19 MR. ROBSON: For the record, this video is of
 20 Brett Campbell's videotaped deposition; is that correct,
 21 Pete?
 22 MR. BARLOW: Yes.
 23 MR. ROBSON: All right. I don't have any other
 24 questions.

EXAMINATION

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24

1 BY MR. BARLOW:
2 Q. Celso, when you told me earlier in your deposition
3 that Ted rigged the second load, was that correct?
4 A. Yes.
5 Q. And didn't you tell me earlier that Ted was the
6 only one who rigged the second one?
7 A. I told him that it was two people that were there.
8 Q. You told me that two people rigged the first load,
9 but you told me that Ted was the only one that rigged the
10 second load; correct?
11 A. No, I didn't say one person because on each side
12 of the trailer there was one person because there is one
13 person putting the belts on this side and there is someone
14 else putting it on the other side.
15 Q. Okay.
16 A. It's just the same. I was on one side, and Brody
17 was on the other side.
18 Q. And was one side of the truss joists closer to the
19 cab of the truck?
20 THE INTERPRETER: I'm sorry, when you say "cab" --
21 MR. BARLOW: Cab. Where the driver drives the
22 truck.
23 A. Yes.
24 Q. (BY MR. BARLOW) And who was rigging the straps on
25 the side of the truss joists that were closer to the cab?

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1 A. Ted.
2 Q. And who was rigging the side that was closer to
3 the end of the truck?
4 A. The other person, that person.
5 Q. Okay. And what was this other person wearing?
6 A. What he had on?
7 Q. What clothing was he wearing?
8 A. I don't remember clearly, but I think it was a
9 raincoat, but I am not sure.
10 Q. Was the person who was rigging closer to the end
11 of the truck? Was he closer to where the -- was he closer
12 to you and Brody?
13 A. Brody.
14 Q. Okay. And was that person who was rigging at the
15 end OF the truck, was he closer to where the truss joists
16 were being unloaded -- closer than Ted?
17 A. Yes.
18 Q. You told me earlier that you handed the straps to
19 Brody who handed the straps to Ted; correct?
20 A. Yes. I was throwing them up to the truck.
21 Q. So if this other individual was closer to you and
22 Brody, why didn't you hand the straps to him?
23 A. I don't know.
24 Q. Isn't it true that there was no other individual?
25 MR. ROBSON: Objection. Argumentative.

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1 Q. (BY MR. BARLOW) Go ahead.
2 A. No.
3 Q. Isn't it true that you were instructed to say that
4 there was another person helping when there really wasn't?
5 MR. ROBSON: Objection. Argumentative. And,
6 Pete, you know, I am going to instruct him not to answer.
7 That's just -- that's just below the belt. I haven't
8 instructed him to say anything other than his memory.
9 MR. BARLOW: Okay. Go ahead and ask him the
10 question.
11 MR. ROBSON: Again, you are instructed not to
12 answer. Did you have another question?
13 Q. (BY MR. BARLOW) Are you going to answer?
14 MR. ROBSON: No, he is not going to answer.
15 MR. BARLOW: I want to hear him say that.
16 Q. (BY MR. BARLOW) Are you going to answer or not?
17 A. No.
18 Q. You said this person was wearing a raincoat. What
19 color was it?
20 A. I don't know. I don't remember.
21 Q. What else was he wearing?
22 A. I don't remember.
23 Q. When did this person get up on the truck?
24 A. I didn't see.
25 Q. When was the first time you saw this person that

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1 morning?
2 A. After we arrived.
3 Q. And what time was it when you first saw this
4 person?
5 A. I didn't -- I didn't see my watch.
6 Q. Where was this person when you first saw him in
7 the morning?
8 A. He was walking around.
9 Q. Where?
10 A. There in the building.
11 Q. Did you ever go into the building?
12 A. No.
13 Q. Then how could you see him walking in the
14 building?
15 A. That's where we were working.
16 Q. Okay. I thought you told me earlier that you
17 arrived at seven o'clock and then waited around until the
18 crane arrived?
19 A. At 7:00 we arrived.
20 Q. Did you ever go into the building? You?
21 A. No, we were waiting outside.
22 Q. Okay. But you could see into the building?
23 A. Yes.
24 Q. I thought the walls were up?
25 A. But there are doors and windows.

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(Pages 88 to 91)

1 Q. Do you know who this individual worked for?
2 A. No.
3 MR. BARLOW: Okay. That's all I have got.
4 MR. ROBSON: Nothing else.
5 (Off the record from 2:59 p.m. to 3:31 p.m.)
6 EXAMINATION
7 BY MR. BARLOW:
8 Q. Celso, just so we're clear, I did not want to
9 impugn your lawyers, your attorneys, Kevin or York about
10 telling you what to say about who rigged the straps.
11 But did anyone at any time ever tell you to say
12 that Brett Campbell helped rig the truss joists?
13 MR. ROBSON: So in other words, if I understand
14 your question, Pete, you're not suggesting that York or I
15 had told him to say something that wasn't the truth, but
16 you're asking if anybody else has asked him to say that
17 Brett Campbell had helped to rig; is that correct?
18 MR. BARLOW: That's correct.
19 MR. ROBSON: Would you interpret that, please.
20 A. No.
21 Q. (BY MR. BARLOW) Celso, and I need to follow up on
22 these. Are you aware that Ted Alexander testified in his
23 deposition that no one helped him rig those truss joists?
24 MR. ROBSON: You are asking if he knew that was
25 Ted Alexander's testimony?

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1 MR. BARLOW: Yes.
2 A. No.
3 Q. (BY MR. BARLOW) Did you know that Brody Tolman
4 testified in his deposition that it was Ted Alexander that
5 put those straps around the truss joists?
6 A. I didn't know anything.
7 Q. You said earlier that Ted was on the truck at the
8 time that the second load of truss joists was being rigged
9 or the straps were being put around that second load of
10 truss joists; correct?
11 A. Yes, he was up on the truck.
12 Q. Okay. And would you agree that Ted would be in a
13 better position to know who put the straps around that
14 second load of truss joists?
15 A. Yes.
16 Q. Would you defer to what Ted said about who put the
17 straps on the second load of truss joists?
18 THE INTERPRETER: Defer meaning are you in
19 agreement or --
20 Q. (BY MR. BARLOW) Would you defer to his testimony?
21 A. What do you mean? I don't understand.
22 Q. Okay. Defer is a -- has a specific meaning.
23 Because Ted was in a better position to know who put the
24 straps around that second load of truss joists, would you
25 defer to his testimony rather than what you said earlier?

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(Pages 92 to 95)

1 A. Yes.
2 Q. Okay. Now, are you aware that Alex Valdez in an
3 affidavit or under oath has said that it was Ted who placed
4 the straps around that second load?
5 A. No, I don't know.
6 Q. Okay. You didn't know that?
7 Then I will represent to you that in an affidavit,
8 Alex Valdez has said that it was Ted and not Brett Campbell
9 who put the straps around that second load of truss joists.
10 And my question to you is: Do you know whether
11 Alex Valdez was closer than you to the back of that truck?
12 A. No.
13 Q. You were closer?
14 A. No.
15 Q. Then Alex was closer?
16 A. Yes.
17 Q. Okay. So would you defer to what Alex saw with
18 regard to who put the straps around that second load of
19 truss joists? Around the second load.
20 A. I don't understand.
21 Q. Okay. If Alex was closer and had a better view of
22 the truss joists, the second load of truss joists, would you
23 defer to what he said concerning who put the straps around
24 that second load of truss joists?
25 A. I don't understand a lot of questions now.

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1 Q. Okay. Let's take a step back.
2 I think you told me that Alex was closer to the
3 second load of truss joists when it was on the truck;
4 correct?
5 A. Yes.
6 Q. Okay. And Alex has said under oath that it was
7 Ted who put the straps around the second load of truss
8 joists, not Brett Campbell.
9 So would you defer to what Alex says about who put
10 the straps around the second load of truss joists?
11 MR. ROBSON: Can we agree that she needs to
12 interpret that "agree" when you say defer. Does he agree
13 with that?
14 MR. BARLOW: No. It's a different -- it's a
15 different --
16 MR. ROBSON: Let me ask the question to the
17 interpreter then. How are you interpreting "defer"?
18 THE INTERPRETER: "Diferir." It's the literal,
19 "diferir."
20 MR. ROBSON: And -- and what does that mean
21 literally?
22 MR. MAJOR: Because did you not say "de acuerdo,"
23 which I would interpret that to mean "are you in agreement."
24 And Pete is saying he wants something different than if you
25 are in agreement by using the word "de acuerdo." I would

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1 interpret that to mean "agreement."
 2 MR. BARLOW: I think she used the word "diferir,"
 3 which is "to defer."
 4 THE INTERPRETER: "Diferir" is to defer,
 5 "postergar," "aplasar."
 6 MR. ROBSON: Okay.
 7 MR. MAJOR: Let's make sure it is clear because I
 8 have also heard her use "de acuerdo," which would be "in
 9 agreement."
 10 MR. BARLOW: No, she first said that and then she
 11 changed to defer.
 12 (Witness speaks in Spanish.)
 13 Q. No, no. It is not the same question. I am asking
 14 whether you would defer to Alex Valdez' testimony, not Ted
 15 Alexander's testimony.
 16 (Interpreter speaks to the witness.)
 17 MR. BARLOW: Ted Alexander.
 18 MR. ROBSON: Would you state what you are asking
 19 him to agree to or --
 20 MR. BARLOW: Defer to.
 21 MR. ROBSON: -- defer to.
 22 Q. (BY MR. BARLOW) If Alex was in a better position
 23 to see who was doing the strapping or putting the strapping
 24 around the second load of truss joists, would you defer to
 25 his testimony regarding who did it?

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1 A. I think that the two of them. If they were both
 2 there doing that, that the two of them then would be at
 3 fault.
 4 Q. But if somebody is in a better position to see who
 5 actually put the straps on, would you defer to that person's
 6 testimony? That's all I am asking.
 7 A. I couldn't tell who was who because I wasn't
 8 looking.
 9 Q. When were you not looking?
 10 A. I wasn't seeing who was tying incorrectly on one
 11 side or who was tying incorrectly on the other side.
 12 Q. And why weren't you seeing that?
 13 A. What I will say is that one of the two are at
 14 fault. One did not -- one tied it incorrectly.
 15 Q. And you --
 16 A. I don't know if it was Ted or the other person,
 17 but I know it was one of them at fault that this thing fell
 18 on me.
 19 Q. But you don't know -- you don't know who put the
 20 straps on the side that fell on you?
 21 A. No.
 22 (Witness speaks in Spanish.)
 23 MR. BARLOW: There is no question pending.
 24 A. Well, I don't know exactly what happened, but I
 25 know something happened, and I know something was wrong.

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1 Q. (BY MR. BARLOW) But you don't know who did
 2 anything wrong?
 3 A. No.
 4 (Witness speaks in Spanish.)
 5 MR. ROBSON: There is no question. Yeah, I have
 6 one more question.
 7 EXAMINATION
 8 BY MR. ROBSON:
 9 Q. When you were watching the two individuals rig the
 10 second load, was there anything interfering with you being
 11 able to see what they were doing?
 12 A. What didn't allow me to see was the fence. I was
 13 seeing the people. I did see that Ted was on this side.
 14 MR. BARLOW: What did he say about the person on
 15 the other side?
 16 A. But I don't know how he was over there, whether he
 17 was tying. I don't know anything.
 18 Q. (BY MR. ROBSON) It was a chain link fence; is
 19 that correct?
 20 A. Yes.
 21 Q. You could see through a chain link fence; is that
 22 correct?
 23 A. Yes.
 24 Q. Is there any question in your mind that both
 25 individuals on the truck for the second load were both

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1 rigging?
 2 A. What do you mean if there is a question?
 3 MR. ROBSON: Does he -- does he agree? Does he
 4 understand that both people were rigging? Is he sure about
 5 that?
 6 A. Yes.
 7 MR. ROBSON: I don't have anything else.
 8 MR. BARLOW: Okay.
 9 MR. MAJOR: We will reserve his right to read and
 10 sign.
 11 (Proceedings were concluded at 3:46 p.m.)
 12 * * *
 13 (Reading copy sent to Mr. Robson.)
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(Pages 96 to 99)

MAR - 8 2007

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CELSO MAGANA and YOLANDA MAGANA,	:	MEMORANDUM DECISION
Plaintiffs,	:	CASE NO. 050914998
vs.	:	
DAVE ROTH CONSTRUCTION, and	:	
JOHN DOES I-V,	:	
Defendants.	:	

This matter came before the Court for a hearing on March 2, 2007, in connection with Dave Roth Construction's Motion for Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsels' oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

The factual background of this case involves a workplace accident in which plaintiff Celso Magana was injured. Mr. Magana was an employee of Circle T Construction, a subcontractor of Dave Roth Construction, on the construction of a Wienerschnitzel restaurant. The accident occurred when a bundle of I-beam joists, which were being unloaded by a crane, fell on Mr. Magana. Deposition testimony presented by Dave Roth Construction indicates that Circle T's owner, Ted Alexander, was

directing the crane operator, who was employed by ABM Crane Rental, when Mr. Magana's accident occurred.


The pivotal issue in this case is whether Dave Roth Construction retained control over Circle T and ABM Crane, its subcontractors, such that it can be liable to Mr. Magana. See Smith v. Hales & Warner Construction, 2005 UT App. 38 (unless a general contractor exercises control over its subcontractor's manner or method of performing the work, the general contractor owes no duty of care to the subcontractor's employees and no liability will attach in the event such employees are injured). The issue of whether a general contractor retained control over a subcontractor's work is usually a factual question for the jury. However, in this case, the undisputed facts demonstrate that Dave Roth Construction did not direct or control the work of Circle T and, more specifically, the "instrumentality of the plaintiff's injuries." In fact, there is no evidence before the Court to indicate that Dave Roth Construction or its employees controlled the process of lifting, rigging and setting down of either of the two loads of joists.

The Court notes that the plaintiff has provided deposition testimony that Dave Roth Construction's superintendent, Brett Campbell, was at the site on the morning of the accident and participated in the unloading process. Dave Roth Construction correctly points out that this testimony is at odds with the testimony of other witnesses and is inconsistent with Mr. Magana's prior testimony during the same deposition. However, even

assuming, as Dave Roth Construction does, that the plaintiff is correct in his assertion that Mr. Campbell helped Mr. Alexander rig one of the two loads of truss joists, there is still nothing to suggest that Mr. Campbell controlled the method or operative detail of the "off-loading process." Rather, the undisputed evidence indicates that the activity which caused Mr. Magana's injuries was controlled by Circle T and ABM Crane. Accordingly, the Court determines that Dave Roth Construction owed no duty of care to Mr. Magana and therefore grants its Motion for Summary Judgment.

Counsel for Dave Roth Construction is to prepare an Order consistent with this Memorandum Decision and submit the same to the Court for review and signature.

Dated this 8 day of March, 2007.



KATE A. TOOMEY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 8 day of March, 2007:

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